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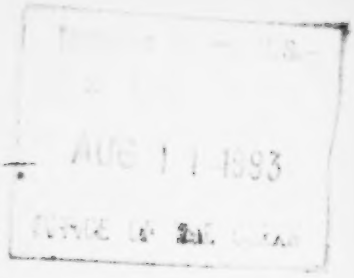

Case No. _____

SUPREME COURT OF THE UNITED STATES

October 1993 Term

PAMELA BEAVERS,
Petitioner,

vs.

STATE OF NEVADA, DEPT.
OF MOTOR VEHICLES &
PUBLIC SAFETY,
Respondent.

Petition for Writ of Certiorari to the
Supreme Court of the State of Nevada

PETITION FOR WRIT OF CERTIORARI

JOHN G. WATKINS, ESQ.
804 S. Sixth Street
Las Vegas, Nv. 89101
(702) 383-1006

480

I.

QUESTION PRESENTED FOR REVIEW

Whether "Due Process" of the Fourteenth Amendment requires that a licensed driver be allowed to challenge the constitutionality of the vehicle stop at the State driver's license revocation action?

II.

TABLE OF CONTENTS

No.		PAGE
I.	QUESTION PRESENTED FOR REVIEW	2
II.	TABLE OF CONTENTS	3
	TABLE OF AUTHORITIES	4
III.	GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.	6
A.	The Date of The Judgement Sought to be Reviewed	6
B.	Date of Order Denying Rehearing.	6
C.	Statutory Provision Conferring Jurisdiction On This Court to Review The Judgment by Writ Of Certiorari	6
D.	Statutory Provisions	7
E.	Statement of Facts	14
F.	Stage In State Proceedings That Federal Issue Was First Presented.	15
G.	Contentions Relied On For Allowance of Writ of Certiorari	16
(1.)	The Protection of the "Due Process" of the Fourteenth Amendment of the United States Constitution Extends to State Driver's License Revocation Hearings.	18
IV.	CONCLUSION	20

TABLE OF AUTHORITIES

STATUTES CITED: **PAGE:**

28 U.S.C. § 1257.....6

NRS 483.560.....16, 17

NRS 484.382.....9

NRS 484.383.....10

NRS 484.384.....12

NRS 484.385.....7

CASES CITED: **PAGE:**

Bell v. Burson, 404 U.S. 535, 91 S.Ct. 1586, 29 L.Ed. 90 (1971).....16,17

Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984)....18

Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).....18

Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).....16

Jennings v. Mahoney, 404 U.S. 25, 92 S.Ct. 180, 302 Ed.2d 146 (1971).....17

Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1969).....18

State, Dept. of Motor Vehicles v. Long, 19 107 Nev. 1, 806 P.2d 1043 (1991)..21

Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).....19

. . .

. . .

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).....18

Welsh v. Wisconsin, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984).....17

CONSTITUTIONAL PROVISIONS:

U.S. Constitution, Amendment IV.....17, 18

U.S. Constitution, Amendment XIV.....16

I.

GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

A.

The Date of Judgment Sought to be Reviewed

The Supreme Court of the State of Nevada on April 27, 1993, denied the Appeal of Petitioner, Pamela Beavers. (See Appendix; P. A-9, Nev. S.Ct. Decision).

B.

Date of Order Denying Rehearing

The Supreme Court of the State of Nevada on July 7, 1993 denied the Rehearing of Petitioner Beavers. (See Appendix; P. A-23, Order denying Rehearing).

C.

Statutory Provision Conferring Jurisdiction On This Court to Review the Judgment by Writ of Certiorari.

28 U.S.C. §1257 provides:

State courts; appeal; certiorari.
Final judgments or decrees rendered by the highest court of a State in which a decision

could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari where the validity of a treaty or statute of the United States is drawn into question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

D.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

At issue in this proceeding are:

1. Amendment IV of the Constitution of the United States of America, which provides:

* * *

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by

Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Amendment XIV of the Constitution of the United States of America, which provides in relevant part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Nevada Revised Statute 484.385 provides:

Driving under the influence of intoxicating liquor or controlled substance: Seizure of license; order of revocation; administrative and judicial review; temporary license; certificate of officer transmitted to department.

1. As agent for the department, the officer who directed that a test be given under NRS 484.382 or 484.383 or who obtained the result of such a test shall immediately serve an order of revocation of the license, permit or privilege to drive on a person who fails to submit to the test or has 0.10 percent or more by weight of alcohol in his blood, if that person is present, and shall seize his license or permit to drive. The officer shall then advise him of his right to administrative and judicial review of the revocation and to have a temporary license, and shall issue him a

temporary license on a form approved by the department if he requests one, which is effective for only 7 days including the date of issuance. The officer shall immediately transmit the person's license or permit to the department along with the written certificate required by subsection 2.

2. When a police officer has served an order of revocation of a driver's license, permit or privilege on a person pursuant to subsection 1, or later receives the result of an evidentiary test which indicates that a person, not then present, had 0.10 percent or more by weight of alcohol in his blood, the officer shall immediately prepare and transmit to the department, together with the seized license or permit and a copy of the result of the test, if any, a written certificate that he had:

(a) An articulable suspicion that the person had been driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance and that the person refused to submit to a required preliminary test;

(b) Reasonable grounds to believe that the person had been driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance and the person refused to submit to a required evidentiary test; or

(c) Reasonable grounds to believe that the person had been driving or in actual physical control of a vehicle with 0.10 percent or more by weight of alcohol in his blood, as determined by a chemical test.

The certificate must also indicated whether the officer served an order of revocation on the person and whether he issued the person a temporary license.

3. The department, upon receipt of such a certificate and copy of the revocation has not been served, after examining the certificate and copy of the result of the chemical test, if any, and finding that revocation is proper,

shall issue an order revoking the person's license, permit or privilege to drive by mailing the order to the person at his last known address. The order must indicate the grounds for the revocation and the period during which the person is not eligible for a license, permit or privilege to drive and state that the person has the right to administrative and judicial review of the revocation and to have a temporary license. The order of revocation becomes effective 5 days after mailing.

4. Notice of an order of revocation and notice of the affirmation of a prior order of revocation or the cancellation of a temporary license provided in NRS 484.387 is sufficient if it is mailed to the person's last known address as shown by any application for a license. The date of mailing may be proved by the certificate of any officer or employee of the department, specifying the time of mailing the notice. The notice is presumed to have been received upon the expiration of 5 days after it is deposited, postage prepaid, in the United States mail.

4. Nevada Revised Statute NRS 484.382 provides:

Driving under the influence of intoxicating liquor or controlled substance: Implied consent to preliminary test; failure to submit to test; use of results of test.

1. Any person who drives or is in actual physical control of a vehicle on a highway or on premises to which the public has access shall be deemed to have given his consent to a preliminary test of his breath for the purpose of determining the alcoholic content of his blood when the test is administered at the direction of a police officer at the scene of a vehicle accident or collision or where he

stops a vehicle, if the officer has an articulable suspicion that the person to be tested was driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance.

2. The person under suspicion must be informed that his failure to submit to the preliminary test will result in the immediate revocation of his privilege to drive a vehicle.

3. If the person fails to submit to the test, the officer shall seize his license or permit to drive as provided in NRS 484.385, and if reasonable grounds otherwise exist, the officer shall arrest him and take him to a convenient place for the administration of a reasonably available evidentiary test under NRS 484.383.

4. The result of the preliminary test must not be used in any criminal action, except to show there was reasonable grounds to make an arrest.

5. Nevada Revised Statute NRS 484.383 provides:

Driving under the influence of intoxicating liquor or controlled substance: Implied consent to evidentiary test; exemption from blood test; choice of test; restrictions on requiring urine test; failure to submit to test.

1. Except as provided in subsections 4 and 5, any person who drives or is in actual physical control of a vehicle or on premises to which the public has access shall be deemed to have given his consent to an evidentiary test of his blood, urine, breath or other bodily substance for the purpose of determining the alcoholic content of his blood or the presence of a controlled substance when such a test is administered at the direction of a police

officer having reasonable grounds to believe that the person to be tested was driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance.

2. The person to be tested must be informed that his failure to submit to the test will result in the revocation of his privilege to drive a vehicle.

3. Any person who is dead, unconscious, or otherwise in a condition rendering him incapable of refusal shall be deemed not to have withdrawn his consent, and any such test may be administered whether or not the person is informed that his failure to submit to the test will result in the revocation of his privilege to drive a vehicle.

4. Any person who is afflicted with hemophilia or with a heart condition requiring the use of an anticoagulant as determined by a physician is exempt from any blood test which may be required pursuant to this section but may be required to submit to a breath or urine test.

5. If the alcoholic content of the blood of the person to be tested is in issue, he may refuse to submit to a blood test if means are reasonably available to perform a breath test. If the person requests a blood test and the means are reasonably available to perform a breath test, and he is subsequently convicted, he must pay for the cost of the substituted test, including the fees and expenses of witnesses in court.

6. If the presence of a controlled substance in the blood of the person is in issue, the officer may direct him to submit to a blood or urine test, or both, in addition to the breath test. The officer shall inform him that his failure to submit to either or both of the blood and urine tests, as required, will result in the revocation of his privilege to drive a vehicle. A failure to submit to either or both of these tests constitutes a failure to submit

to one test under the section.

7. Except as provided in subsection 4 and 6, a police officer shall not direct a person to submit to a urine test.

8. If a person to be tested fails to submit to a required test as directed by a police officer under this section, none may be given, except that if the officer has reasonable cause to believe that the person to be tested was driving or in actual physical control of a motor vehicle while under the influence of intoxicating liquor or a controlled substance, and that the person:

(a) Thereby caused death or substantial bodily harm to another; or (b) Has been convicted of an offense, as defined in subsection 7 of NRS 484.3792, within the previous 7 years,

The officer may direct that reasonable force be used to the extent necessary to obtain a sample of blood from the person to be tested.

6. Nevada Revised Statute NRS 484.384 provides:

Driving under the influence of intoxicating liquor or controlled substance: Failure to consent to evidentiary or preliminary test; test showing 0.10 percent alcohol in blood; revocation of license, permit or privilege; periods of ineligibility.

1. Except as otherwise provided in subsection 2, if person fails to submit to an evidentiary test as directed by a police under NRS 484.383, his license, permit or privilege to drive must be revoked as provided in NRS 484.385 and he is not eligible for a license, permit or privilege to drive for a period of 1 year.

2. If the person who has failed to submit to such a test has had his license, permit or privilege to drive suspended or revoked for failing to submit to such a test within the immediately preceding 7 years, he is not

eligible for a license, permit or privilege to drive for a period of 3 years.

3. If a person fails to submit to a preliminary test of his breath as directed by a police officer under NRS 484.382 or the result of a test given under NRS 484.382 or NRS 484.383 shows that he had 0.10 percent or more by weight of alcohol in his blood at the time of the test, his license, permit or privilege to drive must be revoked as provided in NRS 484.385 and he is not eligible for a license, permit or privilege for a period of 90 days.

4. If revocation of a person's license, permit or privilege to drive under NRS 483.460 follows a revocation under subsection 3 which was based on his having 0.10 percent or more by weight of alcohol in his blood, the department shall cancel the revocation under that subsection and give the person credit for any period during which he was not eligible for a license, permit or privilege.

5. Period of ineligibility for a license, permit or privilege to drive which are imposed pursuant to this section must run consecutively.

7. **Nevada Revised Statute NRS 484.560 provides:**

Driving while license canceled, revoked or suspended; probation, suspended sentences and plea bargaining prohibited; penalties.

1. Except as provided in subsection 2, any person who drives a motor vehicle on a highway or on premises to which the public has access at a time when his driver's license has been canceled, revoked or suspended is guilty of a misdemeanor.

2. <u>If the license was</u> suspended, <u>revoked</u> or restricted <u>because of a violation of</u> NRS 484.379, 484.3795, <u>484.384</u> or homicide resulting from driving a vehicle while under the influence of intoxicating liquor or a

controlled substance, or the violation of a law of any other jurisdiction which prohibits the same conduct, he shall be punished by imprisonment in jail for not less than 30 days nor more than 6 months, and by a fine of not less than $500 nor more than $1,000. No person who is punished under this subsection may be granted probation and no sentence imposed for such a violation may be suspended. No prosecutor may dismiss a charge of such a violation in exchange for a plea of guilty or of nolo contendere to a lesser charge or for any other reason unless, in his judgment the charge is not supported by probable cause or cannot be proved at trial.

3. Any term of confinement imposed under the provisions of this section may be served intermittently at the discretion of the judge or justice of the peace. This discretion must be exercised after considering all the circumstances surrounding the offense, and the family and employment of the person convicted. However, the full term of confinement must be served within 6 months after the date of conviction, and any segment of time the person in confined must not consist of less than 24 hours.

4. Jail sentences simultaneously imposed under this section and NRS 484.3792 or 484.3794 must run consecutively.

5. The department upon receiving a record of the conviction or punishment of any person under this section upon a charge of driving a vehicle while his license was:

(a) Suspended shall extend the period of the suspension for an additional like period.

(b) Revoked shall extend the period of ineligibility for a license, permit or privilege to drive for an additional 1 year.

(c) Restricted shall revoke his restricted license and extend the period of ineligibility for a license, permit or privilege to drive for an additional year.

(d) Suspended or canceled for an indefinite

period, shall suspend his license for an additional 6 months for the first violation and 1 year for each subsequent violation. Suspendions and revocations under this section must run consecutively.

(emphasis added)

E.

STATEMENT OF THE CASE

MATERIAL FACTS

A Nevada Highway Patrolman saw Petitioner, PAMELA BEAVERS, hereinafter, "Pamela" driving northbound on U.S. 95 between Cheyenne and Alexandria at approximately 11:50 P.M. The area was dark and under construction. "Pamela" did not use this road often. The trooper initiated a traffic stop. He stated that the sole basis for the stop was "weaving within the travel lane". The trooper further stated that the driving was lawful and consistent with a sober person. Subsequent to the stop, "Pamela" was arrested for Driving Under the Influence of Alcohol (DUI). She submitted to a breath test under the Nevada Implied Consent Law and blew a reading in excess of 0.10% by weight of

alcohol. As a result, the Nevada Highway Patrolman revoked "Pamela's" driver's license. She requested an administrative hearing to challenge the revocation[1], raising the issue of an unconstitutional stop. The administrative adjudicator never addressed the issue and upheld the revocation. Relief was denied in district court. The Nevada Supreme Court denied "Pamela's" appeal stating, "First, whether the initial traffic stop was lawful is irrelevant in a DMV license revocation proceeding.", and, "...is therefore outside the statutory scope of a license revocation hearing conducted by the DMV." (Appendix, P. A-5, A-6). "Pamela" now seeks relief in this Court by a Petition for Writ of Certiorari.

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[1] The severity of a license revocation can not be overlooked. In addition to a ninety (90) day loss of license, NRS 484.560 mandates imprisonment in jail for not less than 30 days nor more than 6 months, a fine of not less than $500.00 nor more than $1,000.00 and extend the revocation period for an additional year, if a person drives during the revocation period.

F.

Stage In State Proceedings That Federal Issues Was First Presented.

The federal issue was first formally considered orally at the administrative license revocation hearing and later both in writing and orally before the Eighth Judicial District Court, County of Clark, State of Nevada, and before the Supreme Court of the State of Nevada.

The hearing examiner's decision never addressed the constitutionality of the stop. See Appendix, A-1. The district court never specifically addressed the issue. See Appendix, A-6. The Nevada Supreme Court did address the constitutionality of the stop holding,

> "First, whether the initial traffic stop was lawful is irrelevant in a DMV license revocation proceeding.",
>
> and
>
> "...is therefore outside the statutory scope of a license revocation conducted by the DMV."
>
> (Appendix, A-13)

G.

Contentions Relied on for Allowance of Writ of Certiorari

(1.)

The Protection of the "Due Process Clause" of the Fourteenth Amendment of the United States Constitution Extends to State Driver's License Revocation Hearings.

It is well settled that procedural due process guaranteed by the Fourteenth Amendment is applicable to administrative proceedings. ***Goldberg v. Kelly***, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). The United States Supreme Court has consistently held the suspension of an issued driver's license involves state action which adjudicates important interests of licensees and, accordingly, licenses may not be revoked or suspended without procedural due process. ***Bell v. Burson***, 404 U.S. 535, 91 S.Ct. 1586, 29 L.Ed. 90 (1971); ***Jennings v. Mahoney***, 404 U.S. 25, 92 S.Ct. 180, 302 Ed.2d 146 (1971).

Procedural due process guarantees individuals the opportunity to be heard on relevant issues. ***Bell v. Burson***, supra. The constitutionality of the vehicular stop is clearly relevant at a driver's license revocation action.[2] If the stop is illegal, constitutional protection prevents the state from using tainted evidence to revoke the driver's license. To hold otherwise makes a nullity of the Fourth Amendment and undermines the constitutional protection of the right to drive.[3] Equally true, it would encourage unconstitutional conduct by allowing police to randomly stop vehicles for any or no reason. A holder of a

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[2] In ***Welsh v. Wisconsin***, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984), this Court applied Fourth Amendment protection to a noncriminal proceeding. An honest look at Nevada's driver's license revocation proceeding shows it to be "quasi-criminal" even though the state court labeled them civil. Regardless, the distinction is without a difference for constitutional protection.

[3] Whether the entitlement to drive is a "right" or "privilege", constitutional protection applies. ***Bell v. Burson***, supra. U.S. at 539.

driver's license must be allowed to raise and challenge the constitutionality of the stop. It is a well recognized principle of law that the Fourth Amendment of the United States Constitution protects individuals from unauthorized searches and seizures. The Fourth Amendment protects people, not places. ***Katz v. United States***, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1969). A vehicle stop and subsequent questioning of its occupant is a "seizure" under the Constitution. ***Berkemer v. McCarty***, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). A police officer may not stop a vehicle unless he has "specific and articulable" facts that a crime has been or is being committed. ***Terry v. Ohio***, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); ***Delaware v. Prouse***, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). This constitutional protection is applicable to the states. ***Mapp v. Ohio***, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Under Nevada's present scheme, the State is

allowed to revoke an individual's driver's license when the stop is unconstitutional.[4] Such a proceeding violates procedural due process and cannot be allowed to stand.

Certiorari should be granted because the state court has decided an important question of federal law in a way that conflicts with the United States Constitution and applicable decisions of this Court.

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[4] This case is a radical departure from prior precedent by the Nevada Supreme Court. An individual had always been given the right to challenge the constitutionality of the stop at the driver's license revocation hearing. ***State, Dept. of Motor Vehicles v. Long***, 107 Nev. 1, 806 P.2d 1043 (1991).

IV.

CONCLUSION

For the above-cited reasons, this Court should grant certiorari in this case to consider the issue on the merits.

DATED this 31 day of August, 1993.

John G. Watkins

JOHN G. WATKINS, ESQ.
804 S. Sixth Street
Las Vegas, Nevada 89101
(702) 383-1006
Counsel for Pamela Beavers

No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1993

PAMELA BEAVERS,

Petitioner,

vs.

STATE OF NEVADA, DEPT.
OF MOTOR VEHICLES &
PUBLIC SAFETY,

Respondent.

Petition for Writ of Certiorari To The
Supreme Court of the State of Nevada

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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INDEX TO APPENDIX

i. Opinion and Order of the State of Nevada, Department of Motor Vehicles and Public Safety, Hearing Officer.

a. Decision and Order.....A-1

ii. Opinions and Order of the Eighth Judicial District Court of the State of Nevada.

a. Decision.....A-6

iii. Opinion and Order of the Nevada Supreme Court.

a. Decision.....A-9

b. Order Denying Rehearing.....A-23

i. **Opinion and Order of the State of Nevada, Department of Motor Vehicles and Public Safety, Hearing Officer.**

a. Decision and Order

CASE NO: DD900831

STATE OF NEVADA
DEPARTMENT OF MOTOR VEHICLES
& PUBLIC SAFETY

IN THE MATTER OF THE DRIVING PRIVILEGE OF	
PAMELA BEAVERS	SS#: 564-66-8450 DOB: 06-30-47
Petitioner.	

ORDER OF REVOCATION
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND DECISION

The Petitioner, PAMELA BEAVERS, having submitted a request for hearing was regularly served with a Notice of Hearing by certified mail. The hearing was held, as noticed, on the 17th day of October, 1990, at the hour of 3:00 P.M., at the Department of Motor Vehicles and Public Safety, Hearing office, Las Vegas, Nevada. The Petitioner was present and was represented by counsel JOHN G. WATKINS, ESQ. Present as a witness for the Department of

Motor Vehicles and Public Safety was Trooper HONEA of the Nevada Highway Patrol. The witness and Petitioner were sworn and testimony and evidence were taken.

FINDINGS OF FACT

On August 30, 1990 at approximately 11:50 P.M. Trooper HONEA was northbound on US95 north of Cheyenne when he observed a Dodge pickup weaving from line within the travel lane in front of his patrol vehicle. The trooper executed a traffic stop and contacted the driver, identified as PAMELA BEAVERS, Petitioner. There was an odor of an alcoholic beverage on Petitioner's breath and person and her eyes were watery and bloodshot. The Petitioner was asked to submit as a series of field sobriety tests which she failed. Petitioner was arrested for driving under the influence and advised of the Nevada Implied consent law. Petitioner selected an evidentiary test of breath. Petitioner was transported to the city jail.

An evidentiary breath test was conducted on BAC Verifier serial number 506131, approved for evidentiary breath testing by the Committee on Testing for Intoxication on August 20, 1985. Device number 506131 was last calibrated on July 27, 1990, which falls within the 90 day required period.

The device was operated by Trooper HONEA, operator certification number 181482, of the Nevada Highway Patrol. Trooper HONEA utilized alcohol solution lot number S-119 as an external standard and obtained a reading of 0.12%.

Petitioner's evidentiary test was then conducted, results of which indicated a blood concentration of 0.15% of the first breath sample and 0.15% on the second breath sample.

Petitioner was then booked on the charge of DUI and served with a Notice of Revocation for Illegal Per Se.

CONCLUSIONS OF LAW

Under Chapter 484 of the Nevada Revised

Statutes, the conclusions of law in this case are:

That a police officer had reasonable grounds to believe Petitioner was driving or in actual physical control of a vehicle on a highway or on premises to which the public has access, while under the influence or intoxicating liquor or a controlled substance;

That a police officer requested Petitioner take an Evidentiary test of blood or breath, where available, warning that a failure to submit would result in the revocation of Petitioner's privilege to drive a vehicle:

DECISION

Pursuant to the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer hereby finds that all elements of proof necessary to sustain a charge of a violation of the Illegal Per Se Law under Chapter 484 of the Nevada Revised Statutes are supported by substantial evidence.

THEREFORE, it is the decision of the

Hearing Officer that the Order of Revocation withdrawing the driving privilege of PAMELA BEAVERS is affirmed.

An adverse decision may be appealed to District Court under NRS 484.387 within 30 days of the date of this decision.

DATED this 13th day of November, 1990.

DEPARTMENT OF MOTOR VEHICLES
AND PUBLIC SAFETY

_____

JOHN HARNEY
Hearing Officer

ii. Opinion and Order of the Eighth Judicial District Court of the State of Nevada.

a. Decision

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Nevada Bar #003892
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Attorney for Respondent

FILED
May 31 11:01 '91

DISTRICT COURT

CLARK COUNTY, NEVADA

PAMELA BEAVERS, Petitioner, vs. STATE OF NEVADA, DEPARTMENT OF MOTOR VEHICLES AND PUBLIC SAFETY, Respondent.	CASE NO: A290393 DEPT. NO. IV H/DATE: 5-23-91 TIME: 9:00 A.M.

ORDER OF JUDGMENT

This matter having come on regularly for Argument and Decision on May 23, 1991, the STATE OF NEVADA, DEPARTMENT OF MOTOR VEHICLES

AND PUBLIC SAFETY being represented by ANDRES R. RAPPARD, Deputy Attorney General, and the Petitioner being represented by JOHN G. WATKINS, and the court having read the briefs field in this matter, and having heard the oral argument of counsel and being fully apprised in the premises;

The court concludes that the hearing officer's order of revocation was based upon substantial evidence;

HEREBY ORDERED that the Petitioner filed in this matter on November 30, 1990, be, and the same is hereby denied; and

FURTHER ORDERED that the decision of the hearing officer dated November 13, 1990, be, and the same is hereby affirmed and the Department will notify the Petitioner when the revocation period begins.

. . .

DATED: This 31st day of May, 1991.

GERARD J. BONGIOVANNI
DISTRICT JUDGE

Respectfully submitted,

FRANKIE SUE DEL PAPA
Attorney General

By: ANDRES R. RAPPARD

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Deputy Attorney General
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401 S. Third Street
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iii. Decision and Order of the Nevada Supreme Court.

a. Decision.

109 Nev., Advance Opinion 67

IN THE SUPREME COURT OF THE STATE OF NEVADA

PAMELA BEAVERS, Appellant, v. THE STATE OF NEVADA, DEPARTMENT OF MOTOR VEHICLES AND PUBLIC SAFETY, Respondent.

No. 22421

April 27, 1993

Appeal from an order of the district court affirming the Department of Motor Vehicles' revocation of appellant's driving privileges. Eighth Judicial District Court, Clark County; Gerard J. Bongiovanni, Judge.

Affirmed.

John G. Watkins, Las Vegas, for Appellant.

Frankie Sue Del Papa, Attorney General, and Andres R. Rappard, Deputy Attorney General, Carson City, for Respondent.

OPINION

Per Curiam:

This an appeal from an order of the district court affirming the Department of Motor Vehicles' revocation of appellant's driving privilege.

On August 30, 1990, a Nevada Highway Patrol Trooper observed a pickup truck weaving within the vehicle's travel lane. The trooper executed a traffic stop and contacted the driver, appellant Pamela Beavers. There was an odor of alcoholic beverage on appellant's breath and person. Appellant's eyes were watery and bloodshot. The trooper conducted a series of field sobriety tests which appellant failed. Appellant was arrested for driving under the influence of alcohol and advised of the Nevada Implied Consent Law. ***See*** NRS 484.383.

Appellant elected to take an evidentiary breath test. Appellant's test was conducted by a certified operator on a machine approved by the Committee on Testing for Intoxication which

had been calibrated within the required period. The test results indicated the appellant had a blood alcohol concentration of 0.15 percent by weight. Appellant was served with a notice of license revocation pursuant to NRS 484.385. Appellant timely sought administrative review of the revocation of her driving privileges.

An administrative hearing was held on October 17, 1990, before a hearing officer of the Department of Motor Vehicles and Public Safety (DMV). The DMV hearing officer affirmed the order revoking appellant's driving privileges. Appellant thereafter petitioned the district court for review of the administrative decision. On May 31, 1991, the district court entered an order affirming the revocation. This appeal followed.

When reviewing the decision of administrative agency, a court is limited to the agency record, and may not substitute its judgment for that of the agency record, and may not substitute its judgment for that of the agency

as to the weigh of evidence on questions of fact. NRS 233B.135. A reviewing court may reverse the decision of an administrative agency if substantial rights of the appellant have been prejudiced by legal error or abuse of discretion. *Id.* Although a reviewing court is free to decide pure legal questions[1] without deference to an agency determination, the agency's conclusions of law, which will necessarily be closely related to the agency's view of the facts, are entitled to deference, and will not be disturbed if they are supported by substantial evidence. ***State, Dep't of Motor Vehicles v. Torres***, 105 Nev. 558, 560-61, 779 P.2d 959, 961 (1989). Substantial evidence is evidence which a reasonable person might accept as adequate to support a conclusion. ***State, Dep't of Mtr. Vehicles v. Becksted***, 107 Nev.

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[1] A "pure legal question" is a question that is not dependent upon, and must necessarily be resolved without reference to any a fact in the case before the court. An example of a pure legal question might be a challenge to the facial validity of a statute.

456, 458, 813 P.2d 995, 997 (1991).

Appellant contends that her breath test results were inadmissible because the arresting officer did not have specific and articulable facts that a crime was being committed so as to justify his investigatory traffic stop of appellant. See ***Terry v. Ohio***, 392 U.S. 1 (1968). We disagree.

First, whether the initial traffic stop was lawful is irrelevant in a DMV license revocation proceeding. A DMV license revocation hearing is a civil proceeding, not a criminal prosecution. The objective of administrative revocation of a driver's license is not to impose additional punishment, but to protect the unsuspecting public from irresponsible drivers. See ***State, Dep't of Mtr. Vehicles v. McLeod***, 106 Nev. 852, 801 P.2d 1390 (1990)(statements made to officer without Miranda warnings admissible in license revocation proceedings).

Second, the scope of a DMV hearing to review

an order of revocation pursuant to NRS 484.385 is limited to the issues of whether the person failed to submit to an evidentiary test or had 0.10 percent or more by weight of alcohol in her blood at the time of the test. See NRS 484.387(2); ***State Dept. Mtr. Veh. v. Kiffe***, 101 Nev. 729, 709 P.2d 1017 (1985). A person may also challenge whether the police officer who directed the person to submit to an evidentiary test had reasonable grounds, at the time the officer directed the evidentiary test, to believe that the person had been driving or in actual physical control of a vehicle while under the influence of alcohol. See NRS 484.383(1); ***State, Dep't of Motor Vehicles v. Torres***, 105 Nev. 558, 779 P.2d 959 (1989); ***Kiffe***, 101 Nev. 729, 709 P.2d 1017 (1985). Whether an investigatory traffic stop is lawful is therefore outside the statutory scope of a license revocation hearing conducted by the DMV.

Appellant next contends that evidence of

her breath test was inadmissible because the state did not show that the testing device was maintained as required by the regulations of the Committee on Testing for Intoxication. See NRS 484.389(4).[2] Specifically, appellant contends that the state was required to introduce the repair and maintenance records for the testing device. See NAC 484.680(2)(c) and 484.690.[3] We disagree.

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[2] NRS 484.389(4) provides that:

> Evidence of a required test is not admissible in a criminal or administrative proceeding unless it is shown by documentary or other evidence that the law enforcement agency calibrated the testing device and otherwise maintained it as required by the regulations of the committee on testing for intoxication.

[3] NAC 484.680 provides in part that:

> 2. The operator, forensic analyst of alcohol or person who maintains or repairs the device shall enter into the record, at or near the time of his activity, for the:
>
> . . .
>
> (c) Maintenance or repair of the device:
>
> (1) The date and time

In a license revocation proceeding, the state is not required to introduce evidence that a breath-testing device is properly maintained; appellant bears the burden of establishing at

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of the maintenance or repair;

(2) The name of the person performing the maintenance or repair; and

(3) The nature and extent of the maintenance or repair."

NAC 484.690 provides in part that:

1. Each forensic analyst of alcohol who calibrates evidential breath-testing devices shall keep in the ordinary course of his business a chronological record for each device upon which he performs calibrations.

2. The analyst shall enter into his record, at or near the time he calibrates a device:

(a) The date and time of the calibration;

(b) The analyst's name;

(c) The response and accuracy of the device for each test of calibration which is performed; and

(d) The nature and extent of any maintenance or repair which he performs on the device."

the hearing that the machine was improperly maintained. See ***State, Dep't of Mtr. Vehicles v. Rowland***, 107 Nev. 475, 814 P.2d 80 (1991). Appellant failed to meet her burden because she offered no evidence at the hearing to prove that the machine was not properly maintained. Further, appellant made no showing that she unsuccessfully tried to inspect or obtain information about the machine. If appellant desired "full information" regarding the breath machine, the information should have been acquired from the arresting agency by a subpoena duces tecum prior to the administrative hearing. See ***State, Dep't of Mtr. Vehicles v. Tilp***, 107 Nev. 288, 810 P.2d 771 (1991); NRS 484.389(3).

Appellant further contends that her breath test results were inadmissible because the breath machine operator did not wait fifteen minutes before testing appellant after removing gum from appellant's mouth, and that the testing officer should have rinsed out

appellant's mouth after removing the gum. We disagree. The record contained substantial evidence to support the DMV hearing officer's decision. The testing officer completed a "VERAX 'BAC VERIFIER' CHECKLIST" pursuant to NAC 484.670. The checklist indicates that the start time was 12:50 a.m. The second instruction on the checklist is to check the subject's mouth for foreign objects, such as gum, and to have the subject remove the object and rinse the mouth with water. The third instruction on the checklist is to observe the subject for fifteen minutes. Both of these instructions were marked as completed by the officer and the officer also noted that the observation period was satisfactorily completed. The breath test results indicated that the test started at 1:07 a.m., seventeen minutes after the start time on the checklist. There is substantial evidence in the record to support a finding that appellant's gum was removed immediately after 12:50 a.m., that

appellant's mouth was rinsed, and that fifteen minutes of observation followed the removal of the gum prior to beginning the breath test.

Appellant next contends that the breath test results were inadmissible pursuant to NRS 484.389(4) because the testing officer did not comply with NAC 484.670(2)(b) requiring calibration of the breath machine with "alcohol free air."[4] We disagree. There is substantial evidence in the record to support a conclusion by the hearing officer that the testing officer complied with NAC 484.670(2)(b). In particular, the testing officer testified that

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[4] NAC 484.670(2) requires that the certified operator of an evidential breath-testing device:

> Immediately before performing the evidentiary test of the person's breath, shall verify the calibration of the device by testing it using both:
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> (a) An aqueous solution which is certified to contain a specific concentration of alcohol within the range that corresponds to percentage by weight of alcohol in the blood from .05 to .20 percent, inclusive; and
>
> (b) A sample of air which does not contain alcohol.

he followed the appropriate checklist for the operation of the breath testing device, and that the machine printed out the breath test results immediately following the conclusion of appellant's test. The breath machine printout indicates that the machine measured a sample of blank air before appellant was tested and that the blank air sample contained 0.00% alcohol. Further, appellant offered no evidence that the ambient air was not "alcohol free."

Finally appellant contends that she was denied due process of law because the DMV hearing officer's written decision was limited to whether the officer had reasonable grounds to believe that appellant was driving a vehicle while under the influence of liquor or controlled substance, and whether at the time of the evidentiary test she had 0.10% or more of alcohol in her blood. Specifically, appellant contends that the hearing was not "full and fair" because the findings of fact and conclusions of law do not "clearly resolve

all the crucial issues presented" in sufficient detail to permit judicial review. See ***Revert. v. Ray***, 95 Nev. 782, 787, 603 P.2d 262, 264-65 (1979). For the reasons discussed above, this contention lacks merit. The "crucial issues" relevant to a DMV revocation hearing are: (1) whether a person refused to submit to an evidentiary test or had 0.10% or more of alcohol in her blood at the time of the test, and, if challenged, (2) whether the officer had reasonable grounds to direct the person to submit to an evidentiary test. See ***State, Dept. Mtr. Veh. v. Kiffe***, 101 Nev. 729, 709 P.2d 1017 (185). Appellant's contentions regarding (1) the lawfulness of the stoop, (2) whether appellant's gum was removed in a timely manner, and (3) whether "alcohol free air" was used during the breath machine's blank air tests are not "crucial issues" in a DMV license revocation hearing. Appellant's right to due process was therefore not violated by the failure of the hearing officer to resolve

appellant's "non-crucial" contentions.

Accordingly, we affirm the order of the district court.

Rose, C.J.

Steffen, J.

Young, J.

Springer, J.

Shearing, J.

iii. Decision and Order of the Nevada Supreme Court.

b. Order (Denying Rehearing).

IN THE SUPREME COURT
OF THE STATE OF NEVADA

PAMELA BEAVERS,	)	No: 22421
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA, DEPARTMENT OF MOTOR VEHICLES AND PUBLIC SAFETY,	)	
	)	
Respondent.	)	

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

ROSE, C.J.
STEFFEN, J.
YOUNG, J.
SPRINGER, J.
SHEARING, J.

CC: Hon. Gerard J. Bongiovanni,
District Judge
Hon. Frankie Sue Del Papa,
Attorney General
Andres R. Rappard
John G. Watkins
Loretta Bowman, Clerk